

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 27, 2006 Session

**MARJE LARGIN, ET AL. v. WILLIAMSON COUNTY ANIMAL CONTROL
SHELTER/CENTER, ET AL.**

**Appeal from the Circuit Court for Williamson County
No. 05062 Russ Heldman, Judge**

No. M2005-01255-COA-R3-CV - Filed on September 12, 2006

The plaintiffs filed this conversion and negligent bailment action against Williamson County and the County's Animal Control Shelter, alleging the defendants failed and/or refused to return animals and accessory equipment owned by the plaintiffs. The County filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss, contending the complaint did not allege the tort was committed by an employee of the County acting within the scope of employment as required by the Governmental Tort Liability Act. The trial court granted the motion to dismiss and denied the plaintiffs' last minute motion to amend the complaint, finding the proposed amended complaint would not cure the deficiencies. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN, J., and JERRY SCOTT, SR.J., joined.

Dan R. Alexander, Nashville, Tennessee, for the appellants, Marje Largin and Jennifer Siliski.

Lisa M. Carson, Franklin, Tennessee, for the appellees, Williamson County Animal Control Shelter/Center and Williamson County, Tennessee.

OPINION

I.

Plaintiff Jennifer Siliski housed dozens of cats and dogs at her Williamson County home, most of which were Maltese dogs. Many of the animals were owned by Ms. Siliski although several of the animals were owned by other persons, including the co-plaintiff, Marje Largin. Concerns arose regarding the care and treatment of the animals and the conditions in which they were housed at Ms. Siliski's home. In January 2004, the State of Tennessee commenced legal proceedings in the

Williamson County Circuit Court to seize and remove all animals located at Ms. Siliski's home.¹ In addition to the animals, ancillary items, including animal cages, water and food dishes, grooming items, and medications were confiscated. The Williamson County Animal Shelter participated in the removal of the animals from Ms. Siliski's home. The Shelter also participated in housing and caring for the animals pending resolution of the claims by the owners of the animals and determination of what to do with the animals not returned to their owners.² The Williamson County Commission also participated in the dispute, including the passage of a Resolution, number SS09-04A-1, concerning "alternate means of placing the Siliski animals in suitable homes."

When the claims by Ms. Siliski and Ms. Largin in the first proceeding were unsuccessful, at least in part, they initiated this action. Insisting that Williamson County had failed to return all of the animals and accessories, Ms. Siliski and Ms. Largin filed the Complaint to commence this action in January of 2005. They alleged that Williamson County and the Williamson County Animal Control Shelter failed and/or refused to return the animals and accessories as the Circuit Court had ordered in the prior proceeding.³ The failure to return the animals and/or animal accessories, they contended, constituted conversion and/or negligent bailment.

The County filed an Answer to the Complaint in which it denied liability and asserted the claims were barred by the Tennessee Governmental Tort Liability Act (the Act), Tenn. Code Ann. § 29-20-101. Thereafter, the County filed a Motion to Dismiss pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted.⁴ Specifically, the County argued the claims should be dismissed because the County was immune from suit pursuant to the Act. The County also asserted in the motion that Plaintiffs failed to comply with the pleading requirements for negligence claims under the Act, and failed to allege proper notice under the Act.⁵

One day before the scheduled hearing on the County's motion to dismiss, Plaintiffs filed a Motion to Amend the Complaint in an effort to cure the alleged deficiencies addressed in the motion to dismiss. During the hearing on the motion to dismiss, the trial court judge announced that he

¹That action, essentially a prosecution for animal abuse, was *State of Tennessee vs. Jennifer Siliski*, docket number II-CR03192.

²The claims by third parties in the first proceeding were resolved by order of that court entered October 8, 2004.

³They additionally alleged the animals and accessories had been damaged, destroyed or discarded and/or converted for the County or Animal Control Shelter's use.

⁴At some point it was stipulated that the Animal Control Shelter was not a separate entity and the action would proceed against Williamson County as the only defendant.

⁵The motion also asserted that jurisdiction was with the criminal court and the Williamson County Animal Control Shelter is not a legal entity subject to suit. As these issues are not on appeal we do not address them.

would not consider the Motion to Amend because it was untimely.⁶ Following oral arguments on the County's motion, the trial court granted the Motion to Dismiss for failure to state a claim due to the deficiencies in the Complaint.

Following the trial court's dismissal of the complaint, Plaintiffs then filed a Motion to Alter or Amend the Judgment and set a hearing date. The trial court considered and denied Plaintiffs' motion, ruling Plaintiffs' had not timely moved to amend the complaint and the original Complaint was deficient to state a claim. The trial court also noted that it had reviewed the proposed Amended Complaint and found it, too, was deficient; thus, granting the motion to amend would have been futile.

Both Plaintiffs appeal claiming the trial court erred by granting the County's Motion to Dismiss and by denying Plaintiffs' Motion to Amend the Complaint.

II. STANDARD OF REVIEW

The purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal sufficiency of the complaint. It does not challenge the strength of the plaintiff's proof. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). In reviewing a motion to dismiss, we must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *See Pursell v. First American National Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *see also Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696-97 (Tenn. 2002). Thus, a complaint should not be dismissed for failure to state a claim *unless* it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. (emphasis added) *See Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978). Making such a determination is a question of law. Our review of a trial court's determinations on issues of law is *de novo*, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

III. ANALYSIS

Plaintiffs appeal the dismissal of their negligent bailment and conversion claims. The trial court made the finding the Complaint failed to state a claim upon which relief can be granted against Williamson County. The Tennessee Governmental Tort Liability Act (the Act) provides, with limited exceptions set forth at Tenn. Code Ann. §§ 29-20-202 through 205, that "all governmental

⁶Tenn. R. Civ. P. 6.04 and Rule 6 of the Williamson County Local Rules of Practice require motions be filed at least five days prior to the hearing on the motion.

entities shall be immune from suit for any injury which may result from the activities of such governmental entities . . . engaged in the exercise and discharge of any of their functions, governmental or proprietary.” Tenn. Code Ann. § 29-20-201(a). The exception relevant to the present complaint is the waiver, in certain instances, of governmental immunity “for injury proximately caused by a negligent act or omission of any employee [of the county] within the scope of his employment.” Tenn. Code Ann. § 29-20-205

A.

As the Governmental Tort Liability Act explains, “When immunity is removed by this chapter any claim for damages must be brought in strict compliance with the terms of this chapter.” Tenn. Code Ann. § 29-20-201(c). The Act expressly provides, “Immunity from suit of all governmental entities is removed for injury proximately caused *by a negligent act or omission of any employee within the scope of his employment*. . . .” Tenn. Code Ann. § 29-20-205 (emphasis added).

As we stated in *Gentry*, “A complaint against a governmental entity for tort must overtly allege that *the tort was committed by an employee or employees of the governmental entity within the scope of his or their employment*,” and “a complaint which does not so state does not state a claim for which relief can be granted because the action is not alleged to be within the class of cases excepted by the statute from governmental immunity.” *Gentry v. Cookeville General Hosp.*, 734 S.W.2d 337, 339 (Tenn. Ct. App. 1987); *see Lockhart v. Jackson-Madison County General Hosp.*, 793 S.W.2d 943 (Tenn. Ct. App. 1990); *see also Lee v. City of Cleveland*, 859 S.W.2d 347 (Tenn.Ct. App. 1993) (emphasis added).

The relevant allegations of tortious conduct contained in the original Complaint are as follows:

4. On or about January 22, 2004 officials of the Williamson County Animal Control Shelter came to the home of Jennifer Siliski and took from her home a large number of pet animals including dogs and cats and animal cages and accessories and removed this property from the home. These officials took and kept this property for several months and still have the property.

7. The Defendants have failed and refused to return the personal property to the Plaintiffs.

8. The Defendants have damaged, destroyed or discarded the personal property of the Plaintiffs and continue to keep and convert for their use or the use of others the property of the Plaintiffs. The Plaintiffs have made demand for the return of the

property and have been denied the return of the property and are being told they do not have the property.

9. Plaintiffs allege that when the Defendants took the property of the Plaintiffs the parties stood in a bailment relationship, bailor and bailee and that Defendant had the duty to take care not to damage or destroy or waste the property owned by the Plaintiffs.

10. Plaintiffs allege that the Defendants have committed the tort of conversions [sic] of their personal property by taking the property and damaging, conveying, and or destroying the property and refusing to return it and converting it to their own use against the will of the Plaintiffs and without lawful right to do so.

11. Plaintiffs allege that the Defendants were negligent in their bailment relationship with the Plaintiffs by damaging, destroying and discarding the property of the Plaintiffs.

12. Plaintiffs allege that they have been damaged and injured as a result of the actions of the Defendants. The Plaintiffs allege that their personal property has been taken by the Defendants and discarded, converted and destroyed without lawful authority and the Plaintiffs have been wrongfully deprived of their property by the Defendants.

There is no allegation in the Complaint that the tort for which this action was brought was committed by an employee of the County acting within the scope of his or her employment. In *Gentry*, we dismissed the complaint in a governmental tort liability action for failure to state a claim because there was “no allegation in the complaint that the tort for which suit was brought was committed by an employee of the [city] acting within the scope of employment.” *Gentry*, 734 S.W.2d at 339. A complaint in a tort action against a governmental entity must “overtly allege that the tort was committed by an employee or employees of the governmental entity within the scope of his or their employment.” *Id.* The Complaint at issue does not. Accordingly, the trial court acted properly by dismissing the Complaint pursuant to Tenn. R. Civ. P. 12.02(6).

B.

Plaintiffs also argue that the trial court erred in denying the Motion to Amend the Complaint because the Amended Complaint would have cured the pleading deficiencies. Tenn. R. Civ. P. 15.01 provides that the pleadings in a lawsuit may be amended "once as a matter of course at any time before a responsive pleading is served." Otherwise, amendment may be made only "by written consent of the other party or by leave of court." The rule provides that permission to amend should be liberally granted; however, where a motion to amend is filed after a responsive pleading has been filed, the grant or denial of the motion is within the sound discretion of the trial court. Such discretionary decisions by the trial court are not reversed on appeal absent a showing of abuse of discretion, *McKinney v. Educator & Executive Insurers, Inc.*, 569 S.W.2d 829, 833 (Tenn. Ct. App.

1978); *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1980), or failure to allow an amendment will result in injustice. *Wilson v. Riccardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989); *Hopper v. Davidson County*, 333 S.W.2d 917, 920 (Tenn. 1960).

Plaintiffs had prior notice of the alleged deficiencies in the Complaint. The Affirmative Defense was properly asserted in the Answer to the Complaint. Moreover, the motion put Plaintiffs on specific notice; yet, they waited until the day before the hearing to file a motion for leave to amend the Complaint. Tenn. R. Civ. P. 6.04 and Williamson County Local Rule 6 require at least five days notice prior to the hearing of a motion. Considering the foregoing, we find no error with the trial court's discretionary decision to not consider the proposed amendment to the complaint.

C.

We also note the trial court volunteered an advisory opinion concerning the proposed Amended Complaint. In the advisory opinion the trial court stated the proposed Amended Complaint was also deficient and thus it would have been futile to grant the motion to amend.

The proposed Amended Complaint read in pertinent part:

The Plaintiffs allege that the officials who took the property and held it and refused to return the property and committed the acts alleged, were employees of Williamson County, Tennessee acting within the scope of their employment and authority and acted negligently or by omission. None of the exceptions listed in T.C.A. § 29-20-205 are applicable.

The proposed Amended Complaint merely added a conclusory allegation, and no new specifics were included in the amendment. We therefore agree with the trial court's conclusion that granting the motion to amend would have been a futile attempt to cure the deficiencies of the Complaint.

IV.

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against appellants, Marje Largin and Jennifer Siliski.

FRANK G. CLEMENT, JR., JUDGE